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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 MICHAEL A. CERVANTES, ) Case No. CV 15-8911-AG (JPR)  
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13 Petitioner, )  
14 ) ORDER TO SHOW CAUSE  
15 v. )  
16 W.L. MONTGOMERY, Warden, )  
17 )  
18 Respondent. )  
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27 On November 10, 2015, Petitioner constructively filed a  
28 Petition for Writ of Habeas Corpus by a Person in State Custody,  
challenging his convictions and 25-years-to-life sentence for  
attempted robbery and related crimes. (Pet. at 2, 62.)<sup>1</sup> The  
Petition raises six claims, four of which, Petitioner  
acknowledges, have not been exhausted in state court. (Id. at 54  
(checking boxes indicating that claims have not previously been  
raised and stating that "Grounds three through six are being held  
awaiting defense case file, lack of discovery which without this

27 <sup>1</sup> Because the pages of the Petition are not in order, the  
28 Court uses the pagination provided by its Case Management/  
Electronic Case Filing system.

1 information Petitioner may not adequately build and attack").)  
2 The Court's review of the California Appellate Courts' Case  
3 Information website confirms that Petitioner has never filed a  
4 habeas petition in the state court of appeal or supreme court.  
5 (See also id. at 17 (stating that he has not filed any state  
6 habeas petitions).) On direct appeal he raised only grounds one  
7 and two of the Petition. (See id. at 4, 22.)

8 Under 28 U.S.C. § 2254(b), habeas relief may not be granted  
9 unless a petitioner has exhausted the remedies available in state  
10 court.<sup>2</sup> Exhaustion requires that the petitioner's contentions  
11 were fairly presented to the state courts, Ybarra v. McDaniel,  
12 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits  
13 by the highest court of the state, Greene v. Lambert, 288 F.3d  
14 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal  
15 court will not entertain a habeas petition unless the petitioner  
16 has exhausted the available state judicial remedies on every  
17 ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518  
18 (1982). A federal court may raise the failure-to-exhaust issue  
19 sua sponte and summarily dismiss on that ground. See Granberry  
20 v. Greer, 481 U.S. 129, 134-35 (1987); Stone v. City & Cty. of  
21 S.F., 968 F.2d 850, 856 (9th Cir. 1992) (dictum).

22 As Petitioner acknowledges, grounds three, four, five, and  
23 six of the Petition are unexhausted; Petitioner's inclusion of  
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25 <sup>2</sup> A habeas petition "shall not be granted unless it appears  
26 that – (A) the applicant has exhausted the remedies available in  
27 the courts of the State; or (B)(i) there is an absence of available  
28 State corrective process; or (ii) circumstances exist that render  
such process ineffective to protect the rights of the applicant."  
28 U.S.C. § 2254(b)(1).

1 them thus renders the Petition "mixed," containing both exhausted  
2 and unexhausted claims. Such petitions must generally be  
3 dismissed. See Rose, 455 U.S. at 522.

4 In certain "limited circumstances," a district court may  
5 stay a mixed petition and hold it in abeyance while the  
6 petitioner returns to state court to exhaust any unexhausted  
7 claims. See Rhines v. Weber, 544 U.S. 269, 277 (2005). Under  
8 Rhines, the prerequisites for obtaining a stay while the  
9 petitioner exhausts his state remedies are as follows: (1) the  
10 petitioner must show good cause for his failure to earlier  
11 exhaust the claims in state court, (2) the unexhausted claims  
12 must not be "plainly meritless," and (3) the petitioner must not  
13 have engaged in "abusive litigation tactics or intentional  
14 delay." Id. at 277-78. Although Petitioner needs the Court's  
15 approval for a stay of the federal proceedings, nothing prevents  
16 him from immediately raising the claims in state court, stay or  
17 no stay.

18 Petitioner acknowledges that grounds three, four, five, and  
19 six are unexhausted but seems to assert that his good cause for  
20 not earlier exhausting them is that he does not have his "case  
21 file." (Pet. at 54.) But he nowhere explains what steps he has  
22 taken to obtain his file, why he needs it, and precisely what  
23 documents he is missing. Indeed, Petitioner acknowledges that "I  
24 made progress in obtaining my transcripts," stating that he  
25 received them in "late May/early June." (Id. at 56.) And given  
26 that Petitioner attached to the Petition various documents from  
27 the state-court record, he clearly has at least some other  
28 portions of his file. Petitioner also asserts that he has had

1 limited law-library access because he was in administrative  
2 segregation for five months (see id.), but such circumstances  
3 generally do not warrant a Rhines stay. See Davis v. Biter, No.  
4 12-CV-3001-BEN (BLM), 2014 WL 2894975, at \*8 (S.D. Cal. June 25,  
5 2014). Thus, it is unclear from the face of the Petition whether  
6 Petitioner can meet the Rhines requirements, and in any event he  
7 has not requested a stay of these proceedings.

8 IT THEREFORE IS ORDERED that within 21 days of the date of  
9 this Order, Petitioner do one of the following:

10 (1) file a formal stay-and-abey motion if he believes he can  
11 make the required showings under Rhines;

12 (2) request that the Petition be dismissed without prejudice  
13 under Federal Rule of Civil Procedure 41(a)(1), with the  
14 understanding that any later petition may be time barred under  
15 § 2244(d)(1);

16 (3) request that grounds three, four, five, and six of the  
17 Petition be dismissed and he be allowed either to proceed on the  
18 exhausted claims, grounds one and two, or seek a stay of the then  
19 fully exhausted Petition under Kelly v. Small, 315 F.3d 1063 (9th  
20 Cir. 2003) (as amended) (allowing for stays of fully exhausted  
21 federal petitions without showing of good cause), overruling on  
22 other grounds recognized by Robbins v. Carey, 481 F.3d 1143, 1149  
23 (9th Cir. 2007), with the understanding that he will be allowed  
24 to amend any newly exhausted claims back into the Petition only  
25 if the claims are timely or "relate back" to the original  
26 exhausted claims, see Mayle v. Felix, 545 U.S. 644, 664 (2005);  
27 or

28 (4) show cause in writing why this action should not be

1 dismissed without prejudice for failure to exhaust state  
2 remedies.

3 Petitioner is expressly warned that his failure to timely  
4 comply with this Order may result in the Petition being dismissed  
5 for the reasons stated above and for failure to prosecute.<sup>3</sup>

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7 DATED: November 24, 2015

  
JEAN ROSENBLUTH  
U.S. MAGISTRATE JUDGE

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<sup>3</sup> The Court takes no position at this point on whether the  
Petition was timely filed under the AEDPA.